United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1154

To be argued by
IRVING L. WEINBERGER

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

HOWARD FINKELSTEIN, a/k/a ROBERT HOWARD, ANTHONY SCARDINO, ALAN SEGAL and EDWARD ZUBER,

Appellants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLANT, HOWARD FINKELSTEIN, a/k/a ROBERT HOWARD

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UNITED STATES OF AMERICA,

Appellee,

-against-

HOWARD FINKELSTEIN, a/k/a Robert Howard, ANTHONY SCARDINO, ALAN SEGAL and EDWARD ZUBER,

Appellants.

- X

BRIEF FOR APPELLANT HOWARD FINKELSTEIN, a/k/a ROBERT HOWARD.

THE INDICTMENT

Count One named Howard as a member of the conspiracy (JA 8). Paragraph III of the Conspiracy Court alleged that Howard participated in carrying out the conspiracy by selling unregistered Pioneer stock at artificially inflated prices for his own gain in two specified transactions (JA 11):

> (VIII) a sale of 10,000 shares to the co-conspirator Karfunkel at $1.50 per share, the proceeds of which were distributed to Acton, Clegg, and Howard (JA 12);
>
> (IX) A trade by Acton, Howard and Zuber of 6,900 shares for seven fur coats (JA 12-13).

Paragraph Four of the Conspiracy Court alleged

three overt acts applicable to Howard, as follows (JA 13):

> (10) A meeting attended by Howard with Acton, McKibbon, Scardino and Zuber at the end of December, 1969 or early in January, 1970 at the Holiday Inn in Reno (JA 14);
>
> (11) Delivery by Acton, Howard and Zuber of 6,900 shares to Grant, the furrier, on January 10, 1970 (JA 14);
>
> (12) Delivery by Howard to Karfunkel, the co-conspirator, of 10,000 shares on February 24, 1970 (JA 14);

In the substantive counts of the indictment, Howard's name appears under the heading "Counts Seventeen Through Twenty-Nine" (JA 19). Said counts allege a scheme to defraud in the sale of securities by the use of the mails (JA 19). Paragraph 2 of said Counts alleges that the charges set forth in paragraphs 3 of the Conspiracy Count (JA 10-13) are repeated and realleged (JA 19). Paragraph 3 of said Counts specifies that Howard used the mails in furtherance of the scheme alleged in Count 29, namely the trade with Grant of 6,900 shares for seven fur coats on January 10, 1970 (JA 19-20).

Howard's name appears again under the heading "Counts Thirty Through Forty-Six") (JA 20). Said counts

also allege a scheme to defraud by use of the mails (JA 21). Paragraph 2 of said Counts alleges that the charges set forth in paragraph 3 of the Conspiracy Court (JA 10-13) are repeated and realleged (JA 21). Paragraph 3 of said Counts specifies that under Count 44 Howard used the mails on February 2, 1970 in connection with an item mailed to Economics Planning Corp., 122 East 42nd Street, New York, N. Y. (JA 21-22).

THE VERDICT

The jury found Howard not guilty of the conspiracy alleged in Count One (JA 1494).

In respect of the counts included under the heading "Counts Seventeen Through Twenty-Nine" (JA 19), the jury determined that Howard was guilty only of Count 29, namely the trade of 6,900 Pioneer shares to Grant in exchange for seven fur coats (JA 1496).

In respect of the counts included under the heading "Counts Thirty Through Forty-Six", the jury determined that Howard was guilty only under Count 44, namely the sale of 10,000 shares to Karfunkel, evidenced by a mailing on February 2, 1970, to Economic Planning Corp. (JA 1498).

It will be established in this Brief that the conviction under Count 44 was clearly erroneous. The evidence showed that Howard alone was involved in the sale of 10,000 shares to Karfunkel at $1.50 per share. By some error which defies comprehension the jury also convicted Segal under Count 44, but acquitted Scardino and Zuber thereunder (JA 1498). Said three defendants did not participate with Howard in the Karfunkel transaction.

Following his conviction under Counts 29 and 44, Howard was sentenced to serve two years on each count, the sentences to run concurrently (JA 7).

POINT I

THE GOVERNMENT'S EVIDENCE FAILED TO ESTABLISH THAT HOWARD WAS GUILTY OF ANY CRIME IN THE FUR COAT TRANSACTION.

The trading of 6,900 shares of Pioneer stock for seven coats occurred on January 10, 1970 (Ex. 63A, JA 1842). The invoice stated the price of the garments at $42,000 (JA 1542). Grant, the furrier, testified that their actual value was $15,000 (JA 921). In return he received

6,900 shares of Pioneer stock (JA 921). Before agreeing to the trade, Grant called his broker and learned that the stock was selling on the market at $6 (JA 932). Having determined that the block of stock was worth approximately $42,000, Grant abandoned his normal mark-up of 25% to 1/3rd, and sold at a markup of 300% (JA 932).

But Grant arranged to make even a bigger killing in the transaction. He agreed with Zuber that he would not sell said shares for 60 days. Also he granted an option for Zuber to repurchase the shares at $10 (JA 916). The option agreement was prepared in Grant's office (JA 919). It was executed by Zuber and Grant (JA 1543). Unfortunately Howard foolishly placed his signature on the document as a witness to its execution by Zuber and Grant (JA 1543).

The prosecutor succeeded in convincing the jury that when a party signs a document in the capacity of a witness to its execution he thereby executes the document and makes himself a party thereto. The Government's summation states (JA 1379-1380):

> "An interesting feature of this situation is the fact that the option agreement, which is in evidence in this case and which was executed by Mr. Howard and by Mr. Zuber, shows that they intended for Mr. Grant to hold on to this stock and, ladies and gentlemen, Mr. Grant said that when he executed this option agreement, he agreed, in effect, to hold this stock for, I believe it is, 60 days, for the benefit of Mr. Zuber, so that Mr. Zuber could come back and buy the stock at a higher price, at $10 a share.
>
> "Mr. Zuber caused this option to be executed and Mr. Howard signed this option because in this way they could induce Mr. Grant to go through with the transaction."

Just as the prosecutor contended, without evidence, that Howard had executed the option, so did he further contend, without evidence, that Howard thereby induced Grant to go through with the transaction (JA 1380).

A truthful summation of the evidence would have established that Howard's sole activity in the fur trade was simply to be present in Grant's office during the negotiation of the trade.

Gardner testified that Howard returned from Reno early in January, 1970, after having performed the acts alleged in Overt Act 10 of the Conspiracy Count (JA 14). Howard was acquitted of the Conspiracy Count. In January Gardner was working out of Segal's office.

Howard said he wanted to buy a fur coat and Gardner mentioned a furrier, Grant, who would accept stock instead of cash (JA 800).

Grant testified that it was Gardner (not Howard) who called him on January 9, 1970 (JA 913). Grant had known Gardner for about a year and had in fact sold him a coat previously (JA 930).

Gardner told Grant that he had clients who were big spenders; he gave the name of Zuber (JA 913). After the appointment was made by Gardner, Howard came to Grant's store with Zuber and Mrs. Zuber. Acton came either on that day or on a subsequent day (JA 915).

Grant testified that it was Zuber who offered to buy some coats and to exchange stock therefor. It was Zuber who said that Pioneer was a good stock and that they intended it to go very high. It was Zuber who proposed the option agreement (JA 915-917).

Grant also testified that it was Zuber who handed over the stock certificates with stock powers (JA 919). On the same day that he received the stock, Grant called on Segal at Segal's office, with Gardner present (not

Howard). Segal then made representations about the Pioneer stock (JA 923-924).

With respect to the prior visits at Grant's shop, Grant testified, under questioning by the Court, that Howard had been present at all those times (JA 923). His testimony reveals a total lack of participation by Howard in any element of the transaction, except to act as witness to the execution of the option. As noted, said act was magnified by the prosecution to convert Howard into a contracting party who had indeed signed the agreement (JA 923).

The summation of Zuber's attorney contains a clear admission that the only party who negotiated said transaction was Zuber alone. Thus (JA 1239):

> "In addition to that, what else did Mr. Zuber do? He arranged for Burney Acton to transfer 6,900 shares of his stock for some fur coats with Mr. Grant. We admit that. We don't deny that."

Acton testified that he attended at Grant's shop with Howard and Zuber (JA 295). He admitted that it was his stock that was traded for the coats (JA 357-358). He received three of the coats. One he retained. One he gave to Clegg and one to Shepherd (JA 296).

Clegg testified that he did receive one coat, which he sold for $2,500 or $5,000 (JA 598-599).

POINT II

HOWARD'S CONVICTION UNDER COUNT 29 WAS CONTRARY TO LAW.

In United States v. Dellaro, (2 Cir. 1938) 99 F 2d 781, the Court held that mere inaction does not make one a party to another's crime. Judge Hand stated (P. 783):

> "Inaction is of course acquiesence, but acquiesence is passive, and to become a party to a crime one must affirmatively unite oneself with the venture, or, in the case of a conspiracy, must agree to take some part in it."

"Aiding and abetting means to assist the perpetrator of the crime (United States v. Williams (1951) 341 U. S. 58, 71 S. Ct. 595. "To be present at a crime is not evidence of guilt as an aider or abettor" (Hicks v. United States, 150 U.S. 442, 14 J. Ct. 144). "Evidence that a person was present where an illegal act occurred is not sufficient evidence without more, to convict him of aiding and abetting that unlawful act" (United States v. Minieri (2 Cir. 1962), 303 F. 2d 550).

See also: Nye and Nissen v. United States, 336 U.S. 613, 69 S. Ct. 766; United States v. Peoni (2 Cir. 1938) 100 F. 2d 401.

In United States v. Garguilo, (2 Cir. 1962), 310 F 2d 249, the Court cited several unusual instances where a jury would be justified in convicting an inactive party as an aider or abettor because it was convinced that he sought to make the crime succeed, or positively encouraged the perpetrator.

Judge Friendly stated the following propositions:

> "Yet, even in an age when solitude is so detested and 'togetherness' so valued, a jury could hardly be permitted to find that the mere furnishing of company to a person engaged in crime renders the companion an aider or abettor."
>
> * * * * *
>
> "The closenss of the issue against Macchia imposed an obligation on the trial judge to instruct the jury with extreme precision, as he realized, and on us to review the charge with what, on a less doubtful case, would be undue meticulousness. See Glasser v. United States, 315 U.S. 60, 67, 62 J. Ct. 457, 86 L. Ed. 680 (1942); United States v. Persico, 305 F. 2d 534, 536 (2 Cir. 1962). Reading the entire charge, we cannot overcome a fear that the judge, quite unwillingly and simply by emphasis, may have led the jury to believe that a finding of presence and knowledge on the part of Macchia was enough for conviction."

In the case at bar, the evidence shows that Howard committed one act in the entire fur transaction. He signed, as a witness, a document which had been executed by two others. Perhaps the trial judge was not immediately aware of the prosecution's nefarious intent to convert Howard into a contracting party of the option agreement, rather than a mere witness thereof (JA 923). But the contention was deliberately stated twice in the summation (JA 1379-1380). The trial court permitted the jury to accept the contention as true. No instruction was then given; nor was the subject ever mentioned in the course of the charge. Judge Friendly's decision in Gargulo mandates a reversal on that ground alone.

POINT III

THE GOVERNMENT'S EVIDENCE FAILED TO ESTABLISH THAT HOWARD WAS GUILTY OF ANY CRIME IN THE SALE OF 10,000 SHARES TO KARFUNKEL.

Howard was convicted under Count 29 for participating in a scheme that defrauded an innocent furrier Grant who sold at a markup of 300%, and then endeavored to

virtually double that profit by means of the option agreement.

Howard was convicted under Count 44 for having sold 10,000 shares at $1.50 per share to a victim named Michael Karfunkel on February 24, 1970.

Karfunkel was named as a co-conspirator, but not as a defendant (JA 9). He testified that he had been told that he would not be prosecuted if he testified truthfully (JA 1062).

Karfunkel was a broker employed by a brokerage house named Economic Planning Corporation (JA 1033). That company received the mailed item specified in Count 44 (JA 22).

Karfunkel was involved in selling Pioneer stock long before the transaction in which Howard sold him 10,000 shares at $1.50 on February 24, 1970. He commenced trading in that stock in November 1969 (JA 1034). Karfunkel testified to the following trades:

> On November 7, 1969, Economic bought 3,500 shares at 7-1/4 and 7-1/2. On the same day Economic sold 2,700 shares to five brokerage houses (JA 1037).
>
> On November 10, 1969, Karfunkel bought 2,000 shares at 8-1/4; and sold 2,100 shares the same day (JA 1037).

In January 1970, Karfunkel thought it was about time he procured some information about the Pioneer stock. Inquiries resulted in a phone call from Gardner and an invitation to Segal's office (JA 1038-1040). He was told that the mine would soon be opened and the Pioneer stock would reach 40 to 50 (JA 1041). Thereafter, Karfunkel conducted the following transactions:

> On January 16, 1970 Kelli Jackson purchased 1,000 shares at 4-1/4. The order was placed by Segal (JA 1040).
>
> On January 19, 1970, on instructions from Gardner, Karfunkel conducted a directed trade, purchasing, 1,300 at 3-1/4 and selling 1,000 at 3-3/4 (JA 1045-1046).
>
> On January 21, 1970, Segal arranged another directed trade in which Karfunkel purchased 2,500 shares at 5 and sold 3,000 at 5-3/8 (JA 1048).
>
> On January 27, 1970, Segal arranged another directed trade in which Karfunkel bought 1,900 shares at 4-1/2 and sold 1,000 at 5-1/4 (JA 1048-1049).
>
> On February 2, 1970, Karfunkel conducted a directed trade in which he bought 3,000 shares at 2-1/2 and sold same at 2-7/8 (JA 1050).
>
> On February 9 and 10, 1970, Karfunkel bought 5,000 shares at 2 and sold same at 2-1/2 (JA 1052).

Karfunkel testified that the price of Pioneer at the end of February 1970 was between a half a dollar and 7/8ths of a dollar (JA 1052).

Up until that juncture there appears to have been no contact between Karfunkel and Howard. On February 25, 1970, Howard called on the phone and offered to sell 10,000 shares at $1.50 (JA 1053-1054). Howard asked for a down payment of $4,500 and the balance after the shares had been transferred (JA 1056-1057).

Exhibit 61A is a receipt signed by Howard for the $4,500 advance (JA 1532). Exhibit 61 B contains a check in said amount drawn to Karfunkel's brother and endorsed by him (JA 1533-1534).

Exhibit 61 C contains a check dated March 10, 1970, drawn to the order of Leah Karfunkel, in the sum of $5,767.88, and deposited to the credit of A & C Enterprises, the company owned by Acton and Clegg (JA 1535).

Exhibit 61 C also contains a check dated March 10, 1970, drawn to the order of Karfunkel's brother in the sum of $3,931.25 and endorsed by Howard (JA 1536).

The record discloses that the jury was seriously

troubled by this Howard-Karfunkel transaction and that it received no assistance from the trial judge to resolve the perplexity. The jury could not understand how Karfunkel could be considered a victim after having himself trafficked in the stock unlawfully over a long period and after having been charged as a co-conspirator. His status as a victim would make sense only if his status as a co-conspirator related exclusively to the unlawful trades, itemized above, which he conducted on behalf of his firm Economic Planning Corporation. If such misconduct could be disregarded, then the jury might consider him a victim where he personally bought 10,000 shares from Howard at $1.50.

The Government's summation listed a large number of victims, but Karfunkel's name was not among them (JA 1317).

The Court's charge instructed the jury that Karfunkel admitted that he had participated in the crimes charged in this case (JA 1391). The charge included a reading of substantially the entire indictment, including Count 44, a mailing on February 2, 1970 to Economic Planning Corporation (JA 1423).

After the jury had commenced its deliberation it sent in a note which requested, among other things, the following (JA 1475):

> "2. Karfunkel testimony re Howard selling of 10,000 shares of stock on 2/4/70, plus the exhibit and check endorsed by Howard."

Said question to the Court constituted a request to have Karfunkel's testimony read. It also called for a clarification of the date of mailing set forth in Count 44, namely, February 2, 1970. The sale transaction commenced on February 25, 1970.

Since it was 10 o'clock at night when said question was submitted, the Court sent the jury off to a hotel without addressing itself to such question (JA 1479). Nevertheless, the prosecutor set the stage for a reading of the Karfunkel testimony by apprising the Court of the specific pages relating to such transaction (JA 1478-1479).

When the jury resumed on the following morning, the Court delivered some additional instructions on technical matters, but gave no attention to the serious

questions relating to the Karfunkel transaction (JA 1483-1485).

At 3:15 P.M. of that day the jury submitted another question as follows (JA 1488).

> "Is Mr. Karfunkel connected with Econcmic Planning Company on stock he allegedly purchased Mr. Finkelstein - Bob Howard? The jury."

The prosecutor had a ready answer to said question. He stated that the record was silent on that point. While it is true that in performing the directed trades itemized above, Karfunkel was acting on behalf of Economic Planning, the checks constituting payment for the 10,000 shares indicate that Karfunkel, as opposed to Economic Planning, was purchasing on his own account. Under that hypothesis, the Government was able to depict Karfunkel individually as the victim of a fraud (JA 1488).

The Court adopted the position that unless it could answer said question with a clear negative, then the issue must be decided by the jury's recollection of the trial evidence (JA 1488).

The several attorneys then present informed the Court that they had no recollection as to whether the

subject was ever discussed in the testimony. This meant that there was no proof in the record that Karfunkel had purchased the 10,000 shares on his own account and had become a victim of fraud thereby (JA 1488-1489).

Karfunkel's testimony as to the fraud which Howard exercised against him, was preposterous. After proceeding through a dozen unlawful trades, with no questions asked as to whether the stock could lawfully be sold, Karfunkel suddenly called for a representation from Howard that the 10,000 shares were free trading stock (JA 1054, 1056).

Before sending the jury back for continued deliberation, the Court delivered an instruction on the question of whether the Karfunkel purchase from Howard was for the account of Economic Planning Corporation. The Court stated (JA 1493):

> "I am afraid that is a question you will have to answer. It turns on your recollection of the evidence and if you want your recollection aided by any testimony or any exhibit, if you will tell me what you want, I will be happy to have that testimony read and /or the exhibit sent in to you, but otherwise, it must be your memory. It is a question I can't answer. You have to answer it."

Left on its own, with no instruction on the facts or the law, the jury convicted Howard of Count 44 (JA 1498). By said verdict the jury determined that the mailing to Economic Planning Corp. on February 2, 1970, evidenced a transaction that actually commenced on February 25, 1970.

Then just to prove to the Court and to the Government that the jury had no comprehension of the charge alleged in Count 44, it rendered verdicts thereon applicable to three other defendants who had no complicity whatever in the 10,000 share tranaction. It held Scardino and Zuber not guilty; and it determined that Segal was guilty along with Howard (JA 1498). Exhibits 61A through 61 D (JA 1532-1536) establish conclusively that Scardino, Zuber and Segal took no part in said Karfunkel transaction.

CONCLUSION

THE JUDGMENT OF CONVICTION AGAINST HOWARD SHOULD BE REVERSED, AND COUNTS 29 AND 44 OF THE INDICTMENT SHOULD BE DISMISSED.

Respectfully Submitted,

IRVING L. WEINBERGER,
Of Counsel

FREDERIC NEWMAN
Attorney for Appellant
Howard Finkelstein a/k/a
Robert Howard

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee,

against

HOWARD FINKELSTEIN, etal.,

Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

James A. Steele *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N.Y.

That on the 31st *day of* July *1975 at* 1) 1 St. Andrews Pl., N.Y., N.Y.
2) 36 W. 44th St., N.Y., N.Y.
3) ~~Anderson Russell Kill & Olick~~ *upon*
630 Fifth Ave, N.Y., N.Y.

deponent served the annexed Brief
1) Paul J. Curran
2) Eleanor Jackson Piel
3) Anderson Russell Kill & Olick

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

James A. Steele
Print name beneath signature

JAMES A. STEELE

Sworn to before me, this 31st
day of July *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

HOWARD FINKELSTEIN,

Appellants.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1235 Plane Street, Union, N.J. 07083

That on the 31st *day of* July *1975, deponent served the annexed* Brief

upon Kirshner & Greenberg *attorney(s) for*

in this action, at 10850 Wilshire Blvd., Los Angeles, Cal. 90024

the address designated by said attorney(s) for that purpose by depositing 2 *true copy* SO *of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 31st
day of July *19* 75

Print name beneath signature

EUGENE L. ST. LOUIS

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977